No. 16-1140

IN THE
Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, ET AL.,
Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, ET AL.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement in the Brief of Petitioners remains unchanged.

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INTRODUCTION

The State of California targets a group of speakers—pro-life pregnancy centers—for disfavored treatment. It does so by gerrymandering a statute that commandeers those centers' speech while letting alone countless others that would further the State's asserted interests.

California forces pro-life licensed centers to point the way to free or low-cost abortions, making those centers complicit in facilitating an act they believe hurts women and destroys innocent lives. Even though these centers hold their pro-life views as a matter of deep religious beliefs, California insists they say what their conscience cannot allow.

California does not stop there. As part of this targeted scheme, it places facially onerous advertising burdens on the pro-life unlicensed centers—unlike anything required elsewhere under California law. Their advertisements must contain an intrusive disclaimer, in multiple languages and conspicuous font, that wrongly implies that the centers should be licensed—even though they provide no services that require a license. This is obviously designed to hamper the centers' efforts to reach their audience.

California's arguments about preventing confusion sound in paternalism and exude a low view of women navigating unplanned pregnancies. The State assumes these women are unable to make phone calls, search the Internet, or ask basic questions of prospective service providers. *But see Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 799 (1988) (recognizing that the public is "free to

inquire" about a nonprofit's services). But these women, whom Petitioners serve every day, care deeply about the decisions they are facing and will do more to equip themselves than California gives them credit.

The Act's gerrymandered scope, compulsion to facilitate abortion, burdensome advertising demands, and overbearing paternalism demonstrate California's unconstitutional attempt to disadvantage "one side of a debatable public question" in its efforts to "express[ ] its views to the people." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2238 (2015) (Kagan, J., concurring) (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 785 (1978)). The First Amendment does not permit California to manipulate the marketplace of ideas in this way.

Despite California's contrary claims, Petitioners do not argue that all laws compelling speech receive strict scrutiny. Rather, strict scrutiny applies here because California has inserted its message into Petitioners' fully protected speech. *See, e.g.*, Pet. Br. 17 (distinguishing fully protected expression subject to strict scrutiny from commercial speech subject to lesser scrutiny). This is why the vast majority of existing disclosure laws would not be affected by Petitioners' argument. This Court vigorously protects against attempts to compel fully protected speech, whether the form of compelled speech is a license plate, a flag salute, or a written disclosure. And because the Act targets Petitioners and is not narrowly drawn, it cannot satisfy even lesser scrutiny.

ARGUMENT

I. The Act Compels Pro-life Pregnancy Centers' Speech.

California inserts its message into fully protected speech. This case does not involve commercial speech, informed consent, or any form of less protected speech. *See* Pet. Br. 39–48; *infra* Part II. By compelling the speech of those engaged in fully protected discussions about pregnancy, motherhood, and human life, the Act infringes on the "individual freedom of mind." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). Worse yet, the Act singles out a disfavored group of speakers for disfavored treatment. It cannot survive intermediate, let alone strict, scrutiny.[1]

A. The Act targets Petitioners as disfavored speakers, and subjects them to disfavored treatment.

California gerrymandered this "facially content-based regulation[ ] of speech" to target pro-life pregnancy centers, raising the "realistic possibility that official suppression of ideas is afoot" with the "intent or effect of favoring some ideas over others." *Reed*, 135 S. Ct. at 2237, 2238 (Kagan, J., concurring); *see also Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S.

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[1] Respondent Montgomery argues that Fallbrook's claims against him are not ripe because there is no imminent threat of enforcement. But no Respondent has disclaimed an intent to enforce the law. Pet.App.55a. Because "[t]he State has not suggested that the newly enacted law will not be enforced, ... plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them." *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988).

622, 642 (1994) (content-based regulations threaten to "excis[e] certain ideas or viewpoints from the public dialogue").

California's efforts to dispute the Act's content-based nature, State Br. 47–48, are meritless and inconsistent with its prior position. Laws compelling speech are content based because they "necessarily alter[ ] the content" of what the speaker would otherwise say. *Riley*, 487 U.S. at 795. The Ninth Circuit had no trouble reaching this conclusion. Pet.App.18a. And California conceded below that the Act is content based, *see* State 9th Cir. Br. 40–42, 42 n.16, as did a legislative committee that analyzed it, *see* JA 49–50 (the licensed and unlicensed notices are "content-based").

Not only is the Act content based, it targets Petitioners as "disfavored speakers," much like the law invalidated in *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564 (2011). Targeting is shown on the face of the Act—specifically in the obvious disparity between the statute's scope and its asserted purposes. Pet. Br. 31–34. To support the Compelled Abortion Referral, California says it has a compelling interest in informing pregnant women about all state-funded services for pregnancy. State Br. 27–28, 52. Yet the Abortion Referral specifically mentions abortion—while omitting childbirth or labor and delivery—as an option, revealing the government's bent.

In addition to its skewed message, the Act excludes most doctors serving pregnant women from making the compelled statement. Of the Abortion Referral's numerous coverage gaps, *see* Pet. Br. 31–34, two are particularly noteworthy: (1) it does not

apply to free community clinics that serve pregnant women unless their "primary purpose is providing family planning or pregnancy-related services," Pet.App.78a; and (2) it does not apply to any private physicians, even those (like obstetricians) whose primary purpose is providing pregnancy-related services, Pet. Br. 32. California does not even attempt to explain its failure to cover the first category. And its conjecture that low-income pregnant women do not seek care from providers that charge fees is belied by its own programs.[2] Only the pro-life centers are unable to avoid speaking the government's message.

Such gerrymandering shows that California has singled out Petitioners for disfavored treatment and imposed burdens on their speech in violation of *Sorrell*. California misreads *Sorrell* and says that the Court there primarily relied on "the legislative record." State Br. 51. In fact, the Court's analysis started with the law "[o]n its face," 564 U.S. at 563, and consulted the legislative record only to confirm what the statutory text already showed, *id.* at 564–65. Likewise, here, the facial gerrymandering is confirmed by statements in the legislative record expressing intent to target pregnancy centers espousing pro-life views.

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[2] *Compare* State Br. 49–50, *with Find a Qualified Provider to Enroll*, California Department of Health Care Services, http://www.dhcs.ca.gov/services/medi-cal/eligibility/Pages/Find-a-Qualified-Provider-to-Enroll.aspx (listing many private doctors for "low income women who believe they are pregnant and do not have Medi-Cal").

B. The Abortion Referral forces Petitioners to facilitate abortion in violation of their conscience.

The Act forces licensed centers to utter speech that violates their conscience. Although they exist to help pregnant women choose life for their unborn children, Pet.App.91a, the Act mandates that they be "instrument[s] for fostering" abortion services, which they "find[ ] unacceptable," *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). This is antithetical to their core mission and makes them complicit in facilitating abortion, which they view as a grave moral wrong and harmful to the women they serve. It violates their protected choice "not to propound a particular point of view," which "is presumed to lie beyond the government's power to control." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 575 (1995).

The demand to facilitate abortion is so intolerable to their conscience—and the impact of the Act's civil penalties so financially crippling—that the centers are pressured to end their pro-life advocacy altogether. *See* Pet.App.105a ("Plaintiff Facilities intend to not comply with the Act"); *id.* at 106a (the Act's penalties will "significantly harm" Petitioners' "ability to continue their expressive operations"); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257 (1974) (a compelled speaker "might well conclude that the safe course" is to stop the speech triggering the compulsion). This would drive out Petitioners, thereby "limit[ing] the variety of public debate," *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 10 (1986) (plurality opinion) (citation omitted) ("*PG&E*"), and "reduc[ing] the quantity of

expression," *Riley*, 487 U.S. at 794 (citation omitted). That will only harm the many women who desire Petitioners' compassionate pro-life counsel and services.

Moreover, when the State "identifies a favored speaker" (here, itself) and forces groups with a contrary view (Petitioners) "to assist in disseminating the [favored] speaker's message," that "necessarily burdens the expression of the disfavored speaker[s]." *PG&E*, 475 U.S. at 15 (plurality opinion); *see also Sorrell*, 564 U.S. at 565 ("Given the legislature's expressed statement of purpose, it is apparent that [the law] imposes burdens ... that are aimed at a particular viewpoint"). California cannot force pro-life centers to be couriers of its message.

C. The Unlicensed Mandate is inaccurate and onerous.

The Unlicensed Mandate wrongly suggests that an unlicensed center should become "licensed as a medical facility by the State of California" for the services it provides. Pet.App.81a. But California does not require licensing for such services. Forcing those centers to post or advertise a message with this negative connotation hurts their efforts to reach women in need of the resources they provide. And it risks harming the women who are discouraged from accessing the free baby supplies, maternity clothes, educational resources, and spiritual and emotional support that Petitioners provide in a way the State does not. In this sensitive realm of discussions about abortion, California is doing the misdirection.

The Unlicensed Mandate particularly burdens the centers' outreach. Requiring a prominent, multi-

language disclaimer in *all print and digital advertisements* (1) forecloses channels of communications with size or character limitations (e.g., internet), (2) increases the cost of media charging by the amount of space (e.g., newspapers, billboards), and (3) clutters and reduces the effectiveness of other alternatives (e.g., bus ads). *See, e.g.*, Heartbeat International Am. Br. 24 (depicting sample ad); *see also Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 146–47 (1994) (finding that "[t]he detail required in the disclaimer ... effectively rule[d] out" certain ads).

California has not pointed to any other example where it mandates multiple languages and conspicuous fonts in advertising. Yet its state laws show that it knows how to impose language requirements in a less burdensome manner.[3] The hardship that the Act imposes on unlicensed centers' messaging is so obvious that California dodges it.

California attempts to retreat from the clear statutory language and speculates that it might be construed to make the advertising requirements less onerous. State Br. 26 n.23.[4] These new alternative constructions come too late, *see Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002), and contradict the

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[3] *E.g.*, CAL. INS. CODE § 10133.10 (insurers advertising in non-English language in smaller health insurance markets must make certain key documents available "in the same non-English language").

[4] For the first time, the State claims "primary threshold languages" is unclear. State Br. 26 n.23. But all the provisions they cite are triggered by specific numbers clearly set forth and regularly updated on a state website. *See* Pet. Br. 11 n.7.

face of the statute. California also claims that Petitioners did not present these arguments below. State Br. 24. But Petitioners have raised the burdensome size, length, and language requirements at each stage of litigation.[5]

D. It does not matter whether the compelled speech endorses beliefs, is attributed to Petitioners, or forbids Petitioners' other speech.

California argues that the Act "does not require an endorsement or statement of belief." State Br. 38. But compelled statements of "fact" violate the First Amendment just like compelled statements of "opinion"—"either form ... burdens protected speech." *Riley*, 487 U.S. at 797–98.

Nor does this Court require an explicit "endorsement" of a compelled statement as a predicate. *Wooley* found a constitutional violation even though the motorist was not forced to express endorsement of the state motto on his license plate.[6] California tries to distinguish *Wooley* and other cases as more ideological than this one. State Br. 38–39. But the nature of Petitioners' speech—conversations about motherhood, childbirth, and abortion—is

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[5] *See* Pet.App.100a, 107a, 110a; NIFLA Mem. in Support of Mot. for Preliminary Injunction 9–10; Prelim. Inj. Hr'g Tr. at 16–17; NIFLA 9th Cir. Br. 17, 20, 26, 54; 9th Cir. Arg. Tr. at 22:27–24:32, available at https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000009827; NIFLA En Banc Pet. 3. California responded to these arguments during oral argument on appeal. 9th Cir. Arg. Tr. at 40:35–43:30.

[6] *Riley* and *PG&E* also did not require speakers to expressly endorse or affirm the mandated message.

quintessentially ideological and fully protected. This case calls for at least the same scrutiny as a dispute over a state motto on a license plate.

California cites *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006), for its claim that the government can force speakers to disclose facts even within the context of a "vigorous debate." State Br. 40–41. But *Rumsfeld* is entirely unlike this case: the law at issue "regulate[d] conduct, not speech. It affect[ed] what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*." 547 U.S. at 60. Here, Petitioners are undeniably speaking when they encourage women to give birth and when making the compelled statements. Additionally, the law in *Rumsfeld* did "not dictate the content of the speech at all, which [was] only 'compelled' if, and to the extent, the school provide[d] such speech for other recruiters." *Id.* at 62. But the Act dictates precise words that must be said and provides no means of avoiding the compelled expression.

Moreover, a compelled-speech claim does not depend on whether a hypothetical observer would misattribute the speech to the compelled speaker. *But see* State Br. 42–44. That is why the business in *PG&E* could not be forced to transmit a third-party newsletter in its billing envelope, even though the newsletter explicitly stated that it was not the business's speech. *See* 475 U.S. at 6–7, 15 n.11 (plurality opinion). Nor is it dispositive that Petitioners are free to "disavow" the compelled speech. State Br. 20, 43. The freedom to otherwise speak does not undo a compelled-speech violation. *See Hurley*, 515 U.S. at 576 (government cannot "require

speakers to affirm in one breath that which they deny in the next") (citation omitted); *PG&E*, 475 U.S. at 11 ("the State is not free ... to force appellant to respond to views that others may hold").

II. No Basis Exists to Apply Commercial or "Professional" Speech Standards.

A. Petitioners' compelled speech is not subject to review under *Zauderer*.

California and the United States argue that *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), governs the Unlicensed Mandate. State Br. 19; U.S. Br. 33. But they ignore that *Zauderer* applies only to commercial speech. 471 U.S. at 651 ("The State has attempted only to prescribe what shall be orthodox in commercial advertising"). This Court has never applied *Zauderer* outside the narrow context of proposing commercial transactions. *See Milavetz, Gallop & Milavetz v. United States*, 559 U.S. 229, 249 (2010) (applying *Zauderer* to "commercial speech"); *Riley*, 487 U.S. at 796 n.9 (citing *Zauderer* for the proposition that "[p]urely commercial speech is more susceptible to compelled disclosure requirements"); *Hurley*, 515 U.S. at 573 (*Zauderer* is confined to "commercial advertising").

Zauderer thus does not apply here because the centers never engage in commercial speech. Yet the United States relies on both *Zauderer* and *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), to argue for commercial speech standards. U.S. Br. 21–22. But *Bolger* identified "an economic motivation" as an element of commercial speech, 463 U.S. at 67, which has no relevance here because Petitioners

operate without any profit motive. Likewise, the United States' claim that a commercial actor who offers "free samples" or "free consultations" "to attract [paying] customers" is engaged in commercial speech, U.S. Br. 21, has no bearing because Petitioners never solicit paying customers.

Zauderer does not apply for another reason. As the United States concedes, *Zauderer* governs "laws that require providers of *commercial* services to disclose factual, uncontroversial information *about their services*." U.S. Br. 9 (emphasis added). Here, however, the Unlicensed Mandate does not describe the centers' own (noncommercial) services.

California and the United States ask this Court to turn *Zauderer* into a free-floating test for all disclosures, commercial or not. Divorcing *Zauderer* from commercial speech would allow mandated disclosure of government-selected facts in fully protected contexts and radically empower the government to control speech. It would lessen speech protections for all kinds of religious and advocacy nonprofits. Such an expansion would subject church soup kitchens to disclosure requirements as restaurants and control women's shelters' speech because they offer hotel-like services. This may be an outcome the government prefers, but the Free Speech Clause forbids it.[7]

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[7] Nor does *Zauderer* apply to the Abortion Referral. *Zauderer* is not even triggered because licensed centers do not engage in commercial speech. Moreover, that standard is not satisfied because, as the United States argues, the Abortion Referral is controversial, and it does not describe licensed centers' services. U.S. Br. 24–25. And as *PG&E* confirms, *Zauderer* does not apply

B. Licensed centers' claims are not subject to a "professional speech" doctrine.

California and the United States argue for reduced constitutional protection whenever the government compels speech by professionals, inviting this Court to create a new speech doctrine.[8] The United States says the standard is "heightened (rather than strict) scrutiny," U.S. Br. 13, but California does not even suggest a standard, admitting that "[t]his Court has never directly articulated the test," State Br. 31. These novel arguments should be rejected.

The proposed "professional speech" rule is unworkable and lacks clear parameters. Even the United States is confused about how to apply its proposed test, suggesting that professional speech is "[1] speech by members of a regulated profession [2] related to their services." U.S. Br. 13. But while acknowledging that the Abortion Referral "does not describe petitioners' own services at all," *id.* at 24, the United States surprisingly concludes that it is professional speech nonetheless, *id.* at 25.

Adopting the requested "professional speech" doctrine would weaken First Amendment protections, giving the government greater power to compel speech. It would permit, for example, a state to require Catholic hospice facilities to post a sign

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"where the messages themselves are biased against or are expressly contrary to the [speaker]'s views." 475 U.S. at 15 n.12.

[8] Neither California nor the United States argues that the "professional speech" doctrine applies to unlicensed centers, presumably because the unlicensed centers are not part of any licensed profession.

saying: "Assisted suicide is a legal option in this state. Call this number for more information."

The suggestion that strict scrutiny does not apply to professionals is refuted by this Court's precedent, and neither California nor the United States has been able to distinguish *In re Primus*, 436 U.S. 412 (1978), or *NAACP v. Button*, 371 U.S. 415 (1963). The distinction they attempt to make is that the NAACP and ACLU were exercising "associational freedoms," U.S. Br. 22, and recruiting "members and allies," State Br. 36. But the United States concedes that the activities there were fundamentally "expressive" and the laws at issue "impaired [the] ability to disseminate the organization[s'] message." U.S. Br. 22–23. The same is true here.

Nor were this Court's holdings based on a finding that the advocacy groups were recruiting associates rather than pro bono clients. The NAACP and ACLU were offering free services to clients, just as Petitioners are here. *See, e.g., Primus*, 436 U.S. at 427 (expression at issue was "solicit[ing] a client for a non-profit organization"). The "professional speech" standard California and the United States propose would require overruling *Button* and *Primus*.

Finally, the theoretical underpinnings supporting "professional speech" arguments do not apply to the Abortion Referral. The State itself says that professional speech occurs when a professional "purports to exercise judgment" on behalf of a client "in the light of his individual needs or circumstances." State Br. 34 (quoting *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring)); *see also* Cato Institute Am. Br. 3–9 (explaining that professional speech is (1)

based on "specialized knowledge" and (2) tailored to a particular client's circumstances). But the Abortion Referral does not involve exercising judgment or personally tailored advice—and it cannot be justified on these grounds.

C. Licensed centers' claims are not subject to informed-consent principles.

Informed-consent principles, like those discussed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 881–84 (1992) (plurality opinion), do not justify the Abortion Referral. A doctor's obligation to obtain informed consent arises within an existing patient-clinician relationship when the patient seeks to undergo a medical intervention. The doctor's duty to inform the patient is limited to disclosing "information about the nature of the procedure" under consideration and its risks, consequences, and alternatives. *Id.* at 882. The medical community confirms this understanding of informed consent. According to the American College of Obstetricians and Gynecologists ("ACOG"), informed consent is "the willing and uncoerced acceptance of a medical intervention by a patient after appropriate disclosure by the clinician of the nature of the intervention and its risks and benefits as well as the risks and benefits of alternatives."[9]

Unlike performing an abortion, confirming a pregnancy is not a medical intervention. No woman needs to give consent to a physician to continue her

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[9] *ACOG Guidelines for Women's Health Care* 80 (3d ed. 2007); *see also Informed Consent*, American Medical Association, https://www.ama-assn.org/delivering-care/informed-consent (similar).

pregnancy, and no doctor is required to discuss abortion with all pregnant patients. But licensed centers must convey the Abortion Referral to every client, regardless of whether she is contemplating any medical intervention the center performs, and despite the fact that abortion is not an "alternative" to any of the limited medical services these centers provide.[10] Informed-consent principles thus do not support the Abortion Referral.

D. Protecting Petitioners' rights will not undermine routine disclosure requirements.

Existing doctrines ensure a proper balance between the government's need to regulate and individuals' right to expressive freedom. Those doctrines belie California's and the United States' claims that ruling for Petitioners will subject "all disclosure requirements" to "strict scrutiny," "overrul[e]" cases applying "lower levels of scrutiny to required disclosures," and invalidate a host of disclosure requirements. *E.g.* State Br. 48; U.S. Br. 10, 12–17.

Unlike this case, where California has inserted its message into fully protected speech, the government has wide latitude to require commercial-speech disclosures. In fact, many of the disclosures California says will be called into question—examples that include "credit-solicitation disclosures" and labeling

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[10] Licensed centers offer short-term services to diagnose pregnancy and refer women to OB/GYNs for comprehensive prenatal care, and labor and delivery. Pet.App.91a.

requirements, State Br. 48 n.41—are inserted into commercial speech and thus subject to *Zauderer*.

Additionally, a state's regulation of professional *conduct* is generally free from First Amendment oversight.[11] States may set standards for licensing in a particular profession and regulate conduct through, for example, professional codes. But the Act is not an across-the-board regulation of any specialized profession or professional activity; it applies selectively to a group of pro-life speakers—and controls their words, not their actions.

Moreover, disclosures requiring an entity to merely explain or implement its legal duty are typically subject to minimal constitutional review. *See Sorrell*, 564 U.S. at 566–67 (the First Amendment does not forbid laws "directed at commerce or conduct"). This explains why obligations to disclose patients' privacy rights, State Br. 42 n.34, and building-evacutation emergency procedures, *id.* at 48 n.41, are constitutional.

Some medically related disclosures fall within informed consent. *See supra* Part II.C. That doctrine justifies many of the medical disclosures that the California cites in its brief. For example, the obligation to disclose the availability of clinical trials, State Br. 35 & n.27, and dangerous substances used in treatments and prescriptions, *id.* at 43 nn.35–36, are classic examples of such laws.

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[11] The State now claims that the Abortion Referral is "not necessarily" speech at all, but "expressive conduct" that can be regulated. State Br. 44. But when the government mandates that certain words be spoken, that is speech.

Finally, even outside these contexts, the government may mandate disclosures if it satisfies strict scrutiny. All of these doctrines demonstrate that the government has many constitutionally sound tools to implement disclosures.

III. The Act's Compelled-Speech Provisions Fail Any Level of Review.

California "bears the burden" of satisfying heightened or strict scrutiny. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000) (strict scrutiny); *see also McCullen v. Coakley*, 134 S. Ct. 2518, 2539 (2014) (heightened scrutiny); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006) (government bears the burden to satisfy strict or heightened scrutiny on a preliminary injunction). It must do so with record evidence of "an actual problem" needing a solution, *Playboy*, 529 U.S. at 822; and when ambiguity exists, the State does not get "the benefit of the doubt," *id.* at 818.

Perhaps recognizing its failure to meet the standard, Calfornia now stretches to justify its one-sided speech mandate with new evidence outside the record. But those paltry references—a few anecdotes and unsupported accusations, State Br. 5 n.10, 7 n.13—were not important enough for California to support with actual evidence and are too little to remedy California's continued failure to establish a sufficient government interest for infringing on free speech.

A. The Abortion Referral does not satisfy strict or intermediate scrutiny.[12]

1. *No compelling or substantial interest.* California claims that the Abortion Referral furthers its interest in providing timely information to low-income women who are pregnant. State Br. 27–28, 52–53. But the State itself has shown that it does not regard this interest as compelling or even substantial because the Act's sizable holes in coverage leave "appreciable damage to that supposedly vital interest." *Reed*, 135 S. Ct. at 2232 (citation omitted). If California believes its informational interest is so vital, the significant gaps in coverage are inexplicable. As is the fact that California's own advertising lacks any mention of abortion. Pet.Br.Add.7a–8a.

To support its informational interest, California plucks isolated statements from *Sorrell*. In so doing, it turns *Sorrell* on its head. When *Sorrell* endorsed citizens having more information, it was not approving government-compelled speech; rather, it was endorsing the flow of information as freely determined by speakers, without government interference. *See* 564 U.S. at 568.

2. *Not narrowly tailored.* The narrow-tailoring analysis considers a law's underinclusiveness, its overinclusiveness, and the availability of less restrictive means. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 805 (2011). The Act's gerrymandered design demonstrates that the Abortion Referral is

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[12] Neither California nor the United States argues that rational basis applies to the Abortion Referral.

underinclusive. And it is overinclusive because it mandates speech to *all* who visit the centers, regardless of whether they are already familiar with California's public-health programs, are visiting for free diapers and baby formula, or have their own moral convictions against abortion.

Petitioners have offered, and California has not explained the inadequacy of, several less restrictive alternatives. Pet. Br. 55–56.[13] But "it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *Playboy*, 529 U.S. at 816; *see also McCullen*, 134 S. Ct. at 2539. California thus has it exactly backwards when it claims that Petitioners have not "support[ed] their contentions" about less restrictive alternatives. State Br. 53. The burden is California's, and it has failed to meet it.

California's focus on the need to reach low-income women opens the door to many additional alternative means of achieving its interest. California has programs that already connect directly with low-income households: CalFresh (assistance benefits in food purchases), CalWORKs/TANF (cash aid and benefits administered through county welfare offices), and WIC (supplemental nutrition and healthcare referrals for mothers, infants, and children).[14] California could easily distribute the information in the Abortion Referral through those programs. And

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[13] Petitioners' suggestions below for how the law could be more narrowly drawn, *see* U.S. Br. 30, in no way concede that those alternatives would survive scrutiny.

[14] *See California*, Benefits.Gov, https://www.benefits.gov/benefits/browse-by-state/state/146.

whatever methods it employs to enroll low-income individuals in these programs should be suitable for delivering the information in the Abortion Referral. But California apparently does none of this.

Responding to alternatives that Petitioners already identified, California argues that posting information on government websites and other forms of self-advertising are not realistic options because California has already engaged in undescribed "outreach efforts." State Br. 53. But no evidence in the record supports this, and the most California can muster are vague statements in the legislative history and links to never-before-cited materials. *See id.* at 5 n.10. Additionally, the State's assumption that women lack the information in the Abortion Referral is based on the number of "people who are eligible for publicly funded healthcare" but "unenrolled." State Br. 53. But a decision not to enroll does not equate to absence of information. California has failed to satisfy its burden: compelling speech "must be a last—not first—resort." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002).

B. The Unlicensed Mandate does not satisfy strict or intermediate scrutiny.

1. *No compelling or substantial interest.* California claims that the Unlicensed Mandate advances its asserted interest in ensuring that women are not confused or deceived when they visit unlicensed pregnancy centers. State Br. 19–25. But those interests are not sufficient here.[15]

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[15] California does not argue that the Abortion Referral furthers its interest in avoiding confusion or deception, and for good

California has not introduced any evidence of actual fraud or deception by unlicensed centers. Nor did the legislature make findings of either. Though the legislature referred to a document drafted by NARAL, State Br. 6–7 nn.12 & 14, a quick skim reveals that the report is a nonobjective advocacy piece, repeatedly referring to pro-life pregnancy centers as "insidious threat[s] to reproductive freedom." NARAL Pro-Choice America, *Crisis Pregnancy Centers Lie: The Insidious Threat to Reproductive Freedom* (2015) (available at https://www.prochoiceamerica.org/wp-content/uploads/2017/04/cpc-report-2015.pdf); *see also* Pet. Br. 52 n.17.[16]

More damning is the absence of any prosecutions for fraud, deceptive practices, or unlicensed practice of medicine against unlicensed centers in California.[17] Either there has been no unlawful deception, or California has deemed it not important enough to prosecute.[18] This dooms the State's attempt to satisfy

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reason: the message does not explain what the licensed centers do; it merely references state-funded services.

[16] California claims that unlicensed centers use "lab coats," State Br. 6, but cites nothing corroborating that accusation other than the NARAL document, which it did not introduce into the record. Likewise, California's allegation that the centers "prevent ... access[ ] to abortion," *id.* at 7, or engage in "misdirection," *id.* at 18, is never explained and not based on evidence.

[17] *E.g.*, under CAL. BUS. & PROF. CODE § 2052 (practicing medicine without a license), CAL. BUS. & PROF. CODE § 17200 et. seq. (unfair competition), or CAL. BUS & PROF. CODE § 17500 (misrepresenting the nature of a business).

[18] California's assertion that unlicensed centers are improperly performing ultrasounds is made without any evidence. State Br. 6–7 n.12. They are not performing ultrasounds. *See, e.g.*, Pet.App.100a–101a. In addition, California does not even

strict or heightened scrutiny. *Riley*, 487 U.S. at 800 (government must "vigorously enforce its antifraud laws" rather than infringing on speech to ensure "that government not dictate the content of speech absent compelling necessity"); *see also McCullen*, 134 S. Ct. at 2537 (same considerations under intermediate scrutiny).

California's interest in notifying women that unlicensed centers' services are "limited" cannot be substantial, much less compelling, when the limited nature of these centers is perfectly permissible under state law. Indeed, all California nonprofits, medical facilities, and other businesses—even the State itself—have finite purposes and offer limited services.

The State raises concerns about logistical challenges facing low-income women as its sole support for the burdensome advertising requirements. State Br. 24–25. But that argument is hopelessly speculative, laced with phrases like "the effect may be," State Br. 18, and "may be too late," *id.* at 24. At bottom, California's argument is that women might be delayed in receiving care. But these centers already direct women to other providers for prenatal care. Pet.App.91a–92a. To the extent that California is arguing a woman's abortion might be delayed, this Court has said that even a mandatory waiting period for abortion is permissible. *See Casey*, 505 U.S. at 885–86 (plurality opinion). Moreover, California's assertion about delay rests on an unproven, likely false, premise: that women who are unsure about the

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require ultrasounds to be performed by licensed medical professionals, and permits "keepsake" and "entertainment" ultrasounds. *See* CAL. HEALTH & SAFETY CODE §123620.

center's services cannot or will not ask questions before visiting. *See Riley*, 487 U.S. at 799.

2. *Not narrowly tailored.* The Unlicensed Mandate is not adequately tailored because it compels precise words crafted to inaccurately suggest that an unlicensed center should do something to become "licensed as a medical facility by the State of California" for its services. Pet.App.81a. On this point, California's reliance on the unchallenged provision in *Riley* is unpersuasive. *See* State Br. 19–20. The *Riley* Court did not rule on the requirement that fundraisers disclose their employer's name and address, but noted that revealing "professional status" in this manner would be constitutional. 487 U.S. at 799 n.11. Unlike the Unlicensed Mandate, that does not insinuate the lack of a required license.

Far from narrow tailoring, the advertising requirements are anomalous in their excessiveness. California has done nothing to defend the font size, number of words, or number of languages required—all of which are needlessly burdensome and evident from the face of the statute. While California argues that the threshold language requirement "serves important purposes" because of its "substantial populations of low-income non-English speakers," State Br. 24, it does not impose these multiple-language advertising requirements anywhere else in California law.

The State claims a lack of record development on this point and tells this Court it "has no basis to reverse." State Br. 25. But the burdensome means are evident on the statute's face, and this Court may rule accordingly. *See Riley*, 487 U.S. at 795–801 (affirming

summary judgment determination that statute compelling speech was unconstitutional with no indication of how it was applied).[19] Highlighting the burden on the unlicensed centers, the government discloses on its own websites that 59% of California's population resides in counties with six or more threshold languages.[20]

In fact, the Unlicensed Mandate is so onerous that it would not even satisfy *Zauderer*. That standard does not permit laws that are overly burdensome—and the multi-language, conspicuous-font advertising requirements are plainly that.

CONCLUSION

A law that inserts the government's message into discussions about deeply divisive issues is dangerous. It threatens "to suppress unpopular ideas or information ... through coercion rather than persuasion." *Turner*, 512 U.S. at 641. The Act does just that, singling out faith-based charities whose mission is to support women in choosing motherhood without fear or cost. The Act violates the First Amendment and must be invalidated.

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[19] Petitioners also brought an as-applied challenge. *See, e.g.*, Pet.App.120a.

[20] *See Estimates*, California Department of Finance, http://www.dof.ca.gov/Forecasting/Demographics/Estimates/E-1/documents/E-1_2017PressRelease.pdf (population by county); *Statistical Briefs*, California Department of Health Care Services, http://www.dhcs.ca.gov/dataandstats/statistics/Documents/Threshold_Language_Brief_Sept2016_ADA.pdf (threshold languages by county).

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